

REMARKS

This is in response to the Office Action dated October 13, 2010. Reconsideration in view of the following is respectfully requested.

Claim 17 is amended to clarify the relative weight percentages of the components with respect to the carrier system, and the carrier system with respect to the overall formulation. No change in scope is presented.

Claims 17, 20, 23, 24, 30 and 31 stand rejected as being obvious over Stora and Zastrow.

Stora is concerned with the conditions for presenting a perfume composition as a water-in-oil or oil-in-water emulsion:

- that is transparent
- with only a small difference between the refractive index of the dispersed phase and that of the continuous phase

Zastrow presents a preparation of:

- magnetically hard particles that are free or in liposomes and
- asymmetrical lamellar aggregates from fluorocarbons and phospholipids wherein the aggregates are loaded with oxygen and have an enhancing effect on the blood circulation and which is stable because of an interaction between both parts of the mixture (see e.g. col. 2, lines 17-19).

In respect of a combination of prior art publications, there must be some motivation or suggestion to the skilled person to combine the separate teachings. In this case, the interest of the skilled person is the aim of maintaining the O₂ concentration in the skin for a longer period of time. The only thing which Stora and Zastrow have in common is that they both use a fluorinated hydrocarbon in a cosmetic. Thus, to establish a *prima facie* case of obviousness, Stora must suggest the desirability of the combination of the product of Zastrow with magnetically hard particles and asymmetrical lamellar aggregates from fluorocarbons and phospholipids wherein the aggregates are loaded with oxygen. Such a motivation is not

recognizable from Stora, and it is also not desirable because phospholipids and magnetically hard particles have very different refractive indexes in relation to one another or to the silicones used by Stora. Neither the magnetically hard particles nor a phospholipid such as lecithin are water soluble - they are only dispersible in water. Therefore, the refractive indexes are very different, and a combination of both publications was categorically undesirable based on the knowledge of a person skilled in the art at the time of applicant's invention. Any other conclusion is impermissible hindsight, see MPEP § 2145. Applicant notes that the claims do not contain a specific exclusion with respect to magnetically hard particles or phospholipids, but this is beside the point. The fact is that these two references are directed towards wholly distinct goals.

"With no change in their respective functions" shows very clearly that in the instant case the functions of Stora to produce a transparent perfume composition as an emulsion is very different to maintaining a remarkable O₂ concentration in the skin for a longer period of time, as in the present invention. The same with Zastrow et al., who aims at enhancing the blood circulation. The skilled person starting with the teaching of Stora, would note the lack of water-dispersability of the Zastrow mechanism, and would simply not take any useful teaching therefrom. The particular oxygenating mechanism of Zastrow can not be simply grafted into the formulation of Stora, particularly where Stora seeks to maintain a transparent perfume formulation. The presence of magnetically hard particles or phospholipids is simply not desirable in such a product.

A further aspect of Stora in relation with the present invention was misinterpreted by the Examiner. Stora mentions contents of perfluorodecalin (PFD) in the examples: Ex. 1 = 2.23 %; Ex. 2 = 2.14 %; Ex. 3 and 4: 4.17 %. This is clearly above the concentration of the fluorinated hydrocarbons in the present claim 17, so that the Examiner's statement on page 12, para. 2 of the Office Action is simply not correct.

Claim 17 reflects:

- (a) a maximum of 10% of fluorinated hydrocarbon in the carrier system
- (b) a maximum of 10% of carrier system in the formulation.

This means a maximum of 1 % (ie. 10 % of 10 %) of fluorinated hydrocarbon in any formulation. This is outside of Stora, who mentions at least 2.14 % by weight in Ex. 2. The Examiner points to Example 1 of Stora in his remarks on page 12 of the Office Action, and according to his opinion, a content of less than 1 % of perfluorinated hydrocarbon oxygen carrier is not contained in the claims. It is now shown clearly that this is not correct. Claim 24 is even further away from the level of Stora, with a content of the perfluorinated hydrocarbon in the cosmetic formulation being significantly lower than 1 % by weight (10 % in a maximum of 1.5 - 6 %, which is 0.15 – 0.6% of the overall formulation).

A further aspect of Zastrow in relation with the present invention are the figures of the O₂ partial pressure. Zastrow mentions in col. 2, line 27 a pressure of 10 - 40 mPa as cited by the Examiner on page 4, last paragraph of the Office Action. The present invention claims a partial pressure loading of 250-400 mbar O₂. As 1 mPa = 1 x 10⁻⁵ mbar , then 10-40 mPa = 0.0001 - 0.0004 mbar. These figures are clearly different from 250-400 mbar of the present invention.

In summary, the above shows that, in addition to the lack of motivation for combining Stora and Zastrow, the most important parameters (amount of perfluorinated hydrocarbon and O₂ pressure) are well outside the claimed limitations. Simply put, there is no case for establishing *prima facie obvious* for a person skilled in the art to combine the teaching of both publications.

Claim 18 stands rejected in view of the above, and further in view of Gross. The applicants submitted a Declaration Under 37 C.F.R. §1.132 on February 10, 2010. In the Examiner's opinion, the results are merely expected by way of routine procedure, and additionally are not of statistical significance. As to the first point, the results of the comparative testing demonstrate a surprising synergy with the claimed system, compared to a system without silicone polymer. The difference is so stark that it must be particular limitations of the claims

invention, and is not foreseeable by mere routine experimentation. As to the lack of statistical significance, the enclosed Supplement to the Declaration confirms that the testing in the earlier Declaration was based on a repetition of the data through 5 iterations, and that the results mentioned in the Declaration were average amounts of the individual values. The improvement of the current system over one lacking the silicone polymer is 700% greater oxygen retention.

None of the references Stora, Gross and Zastrow discuss the problem of prolongation of O₂ presence in a cosmetic formulation, nor do they give any hint or idea as to how that problem could be solved. In contrast to the Examiner's remarks on page 13, lines 4-7, it is not important that perfluorinated hydrocarbons can transport O₂ at any partial pressures, but that the cosmetic formulation comprising the oxygen carrier system is able to hold the O₂ over a prolonged time. Amended claim 18 reflects this connection, and because of the differences between Stora and the instant invention as discussed above on the one hand, and between Zastrow and the instant invention (also discussed above) on the other, there is no motivation from the combined objections of Stora, Zastrow and Gross toward finding a prolonged time of O₂ presence. It could therefore not be *prima facie* obvious to one of ordinary skill in the art and no routine procedure to arrive at the claimed features in claim 19.

The remaining claims are all dependent from main claim 17. As the supplemental references do not add anything which cures the deficiencies of the primary references, these rejections are also insufficient.

Wherefore, allowance of all pending claims is earnestly solicited.

CONDITIONAL PETITION FOR EXTENSION OF TIME

If entry and consideration of the amendments above requires any further extension of time, Applicants respectfully requests that this be considered a petition therefore. The Commissioner is authorized to charge any fee(s) due in this connection to Deposit Account No.

14-1263.

ADDITIONAL FEE

Please charge any insufficiency of fees, or credit any excess, to Deposit Account No. 14-1263.

Respectfully submitted,

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